

DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

BARBARA WALTERS,)
)
Plaintiff,)
)
v.) Civil No. 2012-24
)
COWPET BAY WEST CONDOMINIUM)
ASSOCIATION; THE BOARD OF THE)
COWPET BAY WEST CONDOMINIUM)
ASSOCIATION; ED WARDWELL, MAX)
MARCOURT; BILL CANFIELD, ROSIE)
WELLS, SHARON KOEHLER, DOUG)
REBAK and HERB HORWITZ as Board)
members; MAX HARCOURT, in his)
personal capacity; LANCE)
TALKINGTON; ALFRED FELICE,)
ROBERT COKAYNE, and VINCENT)
VERDIRAMO,)
)
Defendants.)
)

JUDITH KROMENHOEK,)
)
Plaintiff,)
)
v.) Civil No. 2012-25
)
COWPET BAY WEST CONDOMINIUM)
ASSOCIATION; THE BOARD OF THE)
COWPET BAY WEST CONDOMINIUM)
ASSOCIATION; ED WARDWELL, MAX)
MARCOURT; BILL CANFIELD, ROSIE)
WELLS, SHARON KOEHLER, DOUG)
REBAK and HERB HORWITZ as Board)
members; MAX HARCOURT, in his)
personal capacity; LANCE)
TALKINGTON; ALFRED FELICE,)
ROBERT COKAYNE, and VINCENT)
VERDIRAMO,)
)
Defendants.)
)

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 2

ATTORNEYS:

Karin A. Bentz, Esq.

Law Office of Karin Bentz, P.C.

St. Thomas, U.S.V.I.

For Barbara Walters and Judith Kromenhoek.

Joseph G. Riopelle, Esq.

Boyd Richards Parker & Colonnelli

Tampa, FL

Carl R. Williams, Esq.

Richard P. Farrelly, Esq.

Birch, Dejongh & Hindels

St. Thomas, U.S.V.I.

*For Cowpet Bay West Condominium Association, Ed Wardwell,
Max Harcourt, Bill Canfield, Rosie Wells, Sharon Koehler,
Doug Rebak, Robert Cockayne, Vincent Verdiramo, and Herb
Horwitz.*

John H. Benham, III, Esq.

Watts, Benham & Sprehn, P.C.

St. Thomas, U.S.V.I.

Lance Talkington.

Ryan C. Meade, Esq.

Quintairo, Prieto, Woo & Boyer, P.S.

Miami, FL

Alfred Felice.

ORDER

GÓMEZ, C.J.

Before the Court are the motions by Barbara Walters and Judith Kromenhoek to substitute deceased defendant Alfred Felice with his personal representative or successor in interest in Cowpet Bay West Condominium No. 27.

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 3

I. FACTUAL AND PROCEDURAL BACKGROUND

Barbara Walters ("Walters") and Judith Kromenhoek ("Kromenhoek") each own units in the Cowpet Bay West Condominium complex ("Cowpet"), a condominium community located in St Thomas, U.S. Virgin Islands.

At all relevant times, Cowpet's Rules and Regulations provided that

Dogs and farm animals are prohibited. Owners will be fined as specified by the Board of Directors. The Association may require removal of any animal when it becomes bothersome to others or is deemed by the Association to be unacceptable.

(Rules and Regulations, Civil No. 2012-24, ECF No. 31-2.)

In or about February, 2011, Walters obtained a dog pursuant to her doctor's advice. Because the Rules and Regulations prohibited dogs on the Cowpet premises, Walters submitted information about her dog's qualification as a service animal and a letter from her doctor to Louanne Schechter ("Schechter"), the Cowpet Office Manager.

In or about May of 2011, Kromenhoek obtained a dog pursuant to her doctor's advice. In July of the same year, Kromenhoek submitted information to Schechter about her dog's qualification as a service animal. Kromenhoek also submitted to Schechter a letter from Kromenhoek's doctor.

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 4

Subsequently, portions of Walters's and Kromenhoek's applications appeared on an internet blog known as the Cowpet Bay Blog ("the blog"). The blog was allegedly maintained by Cowpet resident Lance Talkington. Walters and Kromenhoek allege that Cowpet residents, including Lance Talkington and Alfred Felice, began to harass and humiliate them in person and via the blog.

It is not clear from the record whether the Board approved Walters's and Kromenhoek's applications.

On April 9, 2012, Walters and Kromenhoek each filed a twenty-count complaint.¹

Subsequently, on May 30, 2012, the Clerk's Office scanned and filed a document captioned "Copy of my Response to Lawyers of Plaintiffs" on behalf of defendant Alfred Felice, pro se. (Civil No. 2012-24, ECF No. 28.) The document is a handwritten letter which appears to be an answer to Walters's and Kromenhoek's complaints. The document is signed by Alfred Felice and dated May 19, 2012.

¹ Pursuant to Fed. R. Civ. P. 42, the two cases will be joined for the specific purpose of resolving the pending motions to substitute.

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 5

Thereafter, on June 1, 2012, Attorney Ryan C. Meade, as attorney for Alfred Felice, filed a document purporting to be a notice of death as to Alfred Felice. The document simply states

COMES NOW the undersigned counsel for Defendant ALFRED FELICE, and notes upon the record, pursuant to Rule 25(a)(1), of the death of ALFRED FELICE during the pendency of this action.

(Civil No. 2012-24, ECF No. 29.) The Certificate of Service indicates that the document was sent (electronically) to

Richard P. Farrelly, Birch, deJongh, Hindels & [sic] PLLC, Poinsettia House At Bluebeard's, 1330 Estate Taarnebjerg, St[.] Thomas, VI 00802 and Karin A. Bentz, Law Office of Karin Bentz, P.C., 18 Dronningens Gade, Suite 8, St. Thomas, VI 00802.

(*Id.*) There is no indication in the record that any hard copies of the document were mailed out to any personal representative or successor in interest to Felice. There are no attachments or exhibits associated with the document.

Walters and Kromenhoek then each filed 22-count amended complaints on June 19, 2012. Walters's complaints were filed in Civil No. 2012-24. Kromenhoek's complaints were filed in Civil No. 2012-25. In their complaints, Walters and Kromenhoek alleged various claims against Cowpet residents, including Alfred Felice.

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 6

Subsequently, on September 4, 2012, Walters and Kromenhoek each moved to substitute Felice with his personal representative or his successor in interest in his Cowpet condominium unit, No. 27. The Certificate of Service associated with the motion to substitute indicates that copies of the motion were sent electronically to

John H. Benham, III, Esq.
Benham & Chan
P.O. Box 11720
St. Thomas, Virgin Islands 00801
E-mail: benham@bclawvi.com

and

Richard P. Farrelly, Esq.
Birch de Jongh & Hindels, PLLC
1330 Taarneberg
St. Thomas, Virgin Islands 00802
E-mail: rfarrelly@bdhlwvi.com,

and by U.S. mail to

Ryan S. Meade, Esq.
Quintairos, Prieto, Wood & Boyce, P.A.
9300 South Dadeland Blvd; 4th Floor
Miami, Florida 333156

(Civil No. 2012-24, ECF No. 55.) There is no indication that any hardcopies were mailed to any personal representative or successor in interest to Felice.

Also, on September 4, 2012, Felice's counsel filed a document captioned "Notice of 90 Days Expiring Since Notice of Death of Alfred Felice." (Civil No. 2012-24, ECF No. 56.) The

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 7

document states that the plaintiffs have "not filed a motion to Substitute a proper party for Alfred Felice within the ninety (90) days of filing of the Notice," pursuant to Fed. R. Civ. P. 25(a). (*Id.*)

Subsequently, on September 21, 2012, Attorney Meade filed a reply to the motions to substitute. Attached to the reply is the affidavit of Jon B. Felice, son of Alfred Felice. In his affidavit, Jon Felice avers

3. That on or about May 25, 2012, Alfred Felice, my father, passed away by accidental drowning.
4. The property located at Cowpet Bay West Condominium No. 27, St. Thomas, Virgin Islands (the "Property") was co-owned by Alfred Felice and his wife Rosemary Felice.
5. Alfred and Rosemary Felice acquired the Property at the same time.
6. Alfred and Rosemary Felice both had title to the Property.
7. Alfred and Rosemary Felice each owned an equal share of the Property.
8. Alfred and Rosemary Felice each had an equal right to possess the Property.
9. On my fathers [sic] death his entire interest in the Property passed to Rosemary Felice, without going through probate.
10. Alfred Felice had no possessions or assets and therefore no estate has been, or will be, probated for him and no personal representative exists, or will be appointed for him.

(Aff. of Jon B. Felice, Civil No. 2012-24, ECF No. 70-1.)

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 8

On February 27, 2013, the Court ordered that the parties show cause at a hearing on March 1, 2013, why the claims asserted against Alfred Felice should not be dismissed for failure to comply with Fed. R. Civ. P. 25.

During the March 1, 2013, hearing, Attorney Meade represented to the Court that Alfred Felice had no will and that Felice's estate had not been probated.

II. DISCUSSION

Federal Rule of Civil Procedure 25 provides the procedure required for substitution after the death of a party:

(1) Substitution if the Claim Is Not Extinguished. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

(2) Continuation Among the Remaining Parties. After a party's death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

(3) Service. A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 9

Fed. R. Civ. P. 25(a) (emphasis added).

III. ANALYSIS

In deciding the plaintiffs' motions to substitute, the Court must first address the issue of whether the plaintiffs' claims against Alfred Felice were extinguished pursuant to Fed. R. Civ. P. 25(a)(1) after Felice's death.² *Giles v. Campbell*, 698 F.3d 153, 155 (3d Cir. 2012). To the extent that the claims survive, the Court must address whether it has personal jurisdiction over Alfred Felice's successors in interest to the extent such successors were not served by either plaintiff pursuant to Fed. R. Civ. P. 4, as required by Fed. R. Civ. P. 25(a)(3). *Id.*

A. Extinguishment

"When a party to a lawsuit dies, the threshold consideration pursuant to Rule 25(a)(1) is whether the claim is extinguished." *Giles*, 698 F.3d at 155-56. The claims asserted against Felice include a claim pursuant to Section 3617 of the FHAA, a claim for intentional infliction of emotional distress, a claim for conspiracy, and a claim for prima facie tort.

² Because Attorney Meade's ostensible "Notice of Death" was not served on Felice's personal representative or successor in interest in accordance with Rule 25, the 90 day substitution period has not yet been invoked. Fed. R. Civ. P. 25(a)(1). As such, the plaintiffs' motions to substitute are timely. *Id.*

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 10

At its core, the Fair Housing Act protects an individual's civil rights. Neither the Fair Housing Act nor its amendments contain any specific provision explaining whether an FHAA lawsuit against a party is extinguished when that party dies. Rule 25 provides no guidance on the survival of such an action either, as it "simply describes the manner in which parties are to be substituted in federal court once it is determined that the applicable substantive law allows the action to survive a party's death." *Robertson v. Wegmann*, 436 U.S. 584, 587 n. 3, 98 S. Ct. 1991, 56 L. Ed. 2d 554 (1978) (quoting *Shaw v. Garrison*, 545 F.2d 980, 982 (5th Cir. 1977)). Rather, where, as here, laws promulgated for the protection of civil rights that

are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C.A. § 1988 (West).

There is no Third Circuit precedent which directly addresses survivorship of claims under the FHA or FHAA. Other circuits, however, have generally addressed the issue of

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 11

survivability. For instance, the U.S. Court of Appeals for the First Circuit has provided some general guidance as to survival of federal claims, explaining that

The federal courts over the years have given a great deal of study to the general problem of survival . . . We see no occasion here to canvass the general problem again or to trace its gradual development. It will suffice for present purposes to say that it was authoritatively established many years ago in *Schreiber v. Sharpless*, . . . that 'At common law, actions on penal statutes do not survive* * * ', and that 'The right to proceed against the representatives of a deceased person depends, not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought', in other words 'Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it.'

Kirk v. C.I.R., 179 F.2d 619, 620 (1st Cir. 1950) (citing *Ex parte Schreiber*, 110 U.S. 76, 80 (1884)). The Eleventh Circuit has explained that

resolution of the survivability issue depends on whether the recovery is deemed "remedial" or "penal." A remedial action is one that compensates an individual for specific harm suffered, while a penal action imposes damages upon the defendant for a general wrong to the public. See *In re Wood*, 643 F.2d 188, 190-91 (5th Cir. 1980). It is well-settled that remedial actions survive the death of the plaintiff, while penal actions do not. *Schreiber v. Sharpless*, 110 U.S. 76, 80, 3 S.Ct. 423, 424, 28 L.Ed. 65 (1884); *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 876 (11th Cir. 1986); *James*, 621 F.2d at 730.

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 12

United States v. NEC Corp., 11 F.3d 136, 137 (11th Cir. 1993).

The Sixth Circuit, in *Murphy v. Household Finance Corp.*, 560

F.2d 206 (6th Cir. 1977), outlined the factors for determining whether an action is remedial or penal.

Three factors in particular deserve attention: 1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; 2) whether recovery under the statute runs to the harmed individual or to the public; and 3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.

Murphy, 560 F.2d at 209 (citing *Huntington v. Attrill*, 146 U.S. 657, 666-69 (1892)).

Applying those factors here, the Court first notes that the purpose of the FHA, passed by Congress as Title VIII of the Civil Rights Act of 1968, is to ensure fair housing throughout the United States. 42 U.S.C.A. § 3601. The FHA prohibits housing discrimination on the basis of, inter alia, race, gender, and national origin. 42 U.S.C. § 3601, et seq. Congress passed the FHAA in 1988 to extend the coverage of the FHA to include people with disabilities. Pursuant to the FHAA, it is unlawful

To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of-

(A) *that person*; or

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 13

(B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or

(C) any person associated with that person.

42 U.S.C. § 3604(f)(2) (emphasis added). The FHA contains a provision for relief to a plaintiff

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, *the court may award to the plaintiff actual and punitive damages*, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

42 U.S.C.A. § 3613 (c)(1) (West) (emphasis added).

The Fifth Circuit has examined the purpose of the FHAA, explaining that

In response to a history of national discrimination against *individuals* with disabilities, Congress enacted the FHAA in 1988. The purpose of the Act was to prohibit discrimination in the national housing market for handicapped *individuals*.

Groome Res. Ltd., L.L.C. v. Parish of Jefferson, 234 F.3d 192, 200-01 (5th Cir. 2000).

The Court agrees with the Fifth Circuit's assessment. Indeed, the plain language of the statute is replete with

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 14

references to the singular complainant. *See, e.g.,* 42 U.S.C.A. § 3604 (f)(1)(A) ("it shall be unlawful-- . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling *to any buyer or renter* because of a handicap of-- *that buyer or renter. . .*") (emphasis added). Significantly, there are few if any references in the statute to generalized wrongs to the public. *See generally* 42 U.S.C.A. § 3614 ("Whenever the Attorney General has reasonable cause to believe that any . . . group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court."). As such, the Court finds that the "purpose" factor weighs in favor of classifying an FHAA action as "remedial."

The Court's consideration of whether recovery under the statute runs to the harmed individual or the general public also reveals the remedial nature of the FHAA's provisions. Recovery under the FHAA runs to a plaintiff as compensation for damages. *See* 42 U.S.C.A. § 3613 (c)(1) (explaining that "the court may award *to the plaintiff* actual and punitive damages . . ."). There is no indication in the statute that a court may award

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 15

damages under the FHAA to the benefit of the general public. As such, this factor weighs in favor of a finding that the FHAA is remedial rather than penal.

Finally, there is no indication that the recovery authorized by the FHAA is *wholly* disproportionate to the harm suffered by an FHAA plaintiff. Indeed, the statute allows a court to award actual damages, which would be directly proportionate to a plaintiff's damages. 42 U.S.C.A. § 3613 (c)(1). Though the statute also permits a court to award punitive damages, which are considered a form of punishment, such damages may not be awarded "absent an actual damages award." *Louisiana ACORN Fair Housing v. LeBlanc*, 211 F.3d 298 (5th Cir. 2000) (holding limited to FHA cases in which no compensatory damages of any kind are awarded). Because the FHAA allows a court to award actual damages and limits an award of punitive damages absent actual damages, the Court finds that the recovery authorized by the statute is not *wholly* disproportionate to the harm suffered by an FHAA plaintiff.

Based on the foregoing, the Court finds that the FHAA's provisions are remedial, not penal. Because the FHAA is remedial, a plaintiff's claims under the statute survive the

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 16

death of a defendant against whom such claims are asserted -
here, Felice.

The remaining claims against Felice, intentional infliction of emotional distress, conspiracy, and prima facie tort, are local in nature. As such, the Court must look to local law for guidance as to survival of such claims. *Giles*, 698 F.3d at 156.

Virgin Islands law clearly provides for survival of such claims. Indeed,

A thing in action arising out of a wrong which results in physical injury to the person or out of a statute imposing liability for such injury shall not abate by reason of the death of the wrongdoer or any other person liable for damages for such injury, nor by reason of the death of the person injured or of any other person who owns any such thing in action. When the person entitled to maintain such an action dies before judgment, the damages recoverable for such injury may include loss of earnings and expenses sustained or incurred as a result of the injury may include damages for pain, suffering and disfigurement, or punitive or exemplary damages, or prospective profits or earnings after the date of death. The damages recovered shall form part of the estate of the deceased. Nothing in this section shall be construed as making such a thing assignable.

V.I. Code Ann. tit. 5, § 77 (2012). Virgin Islands law also provides that

Subject to the provisions of sections 76 and 77 of Title 5, causes of action by one person against another, *whether arising on contract or otherwise*, survive to the personal representatives of the

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 17

former and against the personal representatives of the latter. . . .

V.I. Code Ann. tit. 15, § 601 (2012) (emphasis added).

Based on the foregoing, the Court finds that the plaintiffs' claims against Felice were not extinguished by Felice's death.

B. Personal Jurisdiction

Now the Court will turn to the question of whether it has personal jurisdiction over Felice's representative or successor.

Rule 25(a)(3) requires that both the motion to substitute and the suggestion of death be served pursuant to Rule 5 for parties and pursuant to Rule 4 for nonparties. Felice's successor, whoever that may be, is a nonparty to the plaintiffs' lawsuits. As such, Felice's successor must have been served pursuant to Rule 4. *Giles*, 698 F.3d at 158.

In *Giles v. Campbell*, 698 F.3d 153 (3d Cir. 2012), Wardell Giles, a state prisoner, filed a civil rights action against various correctional officers alleging excessive force and deliberate indifference. While the action was pending in the district court, Gary Campbell, one of the defendant corrections officers, died. Thereafter, on October 22, 2009, the Delaware Department of Justice (the "Government") (representing Campbell and the other defendants) filed a suggestion of death on the

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 18

record. The suggestion of death notified the district court that Campbell had died in July of 2006. On December 14, 2009, Giles filed a motion to substitute Wendy Selby, the administratrix of Campbell's estate as a defendant pursuant to Rule 25(a). Neither the suggestion of death nor the motion to substitute was served on Campbell's estate. The district court judge denied Giles's motion to substitute, holding that Giles's claim against Campbell was extinguished. Giles appealed to the U.S. Court of Appeals for the Third Circuit.

On appeal, the Third Circuit found that Giles's claims against Campbell were not extinguished. The Circuit then turned to the question of whether the trial court had personal jurisdiction over Campbell's estate. In undertaking its analysis, the Third Circuit looked to its decision in *Bass v. Attardi*, 868 F.2d 45 (3d Cir. 1989).

In *Bass*, a defendant (Carr) died during the pendency of the litigation and the attorney who had represented Carr contended that he continued to represent him. *Id.* at 50 n. 12. The attorney in *Bass* filed a suggestion of death on behalf of Carr (and another deceased defendant), and argued that the case against Carr should be dismissed because the plaintiff did not timely move to substitute the defendant's estate. *Id.* We rejected the attorney's arguments at the outset, because "[c]ounsel's attorney-client relationship with Carr ceased at Carr's death." *Id.*; see also *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 962 (4th Cir. 1985) ("The attorney's agency to act ceases with

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 19

the death of his client ... and he has no power to continue or terminate an action on his own initiative."). We concluded our analysis by noting that the suggestion of death "was deficient because the suggestion was not served on the decedents' successors or representatives as required by Fed. R. Civ. P. 25(a)." 868 F.2d at 50 n. 12.

Giles, 698 F.3d at 158. Guided by its holding in *Bass*, the *Giles* court held that

the Government's representation of Campbell ended when he died. We note that there is no evidence that the Government thereafter began representing Campbell's estate. Accordingly, the parties were required to—and failed to—serve Campbell's estate pursuant to Rule 4. We hold that the District Court lacked personal jurisdiction over the estate. See *Ayres v. Jacobs & Crumplar, P.A.*, 99 F.3d 565, 570 (3d Cir. 1996) (holding that personal jurisdiction is not conferred if service under Rule 4 is not properly effected); *Ransom*, 437 F.2d at 519 (same).

Giles, 698 F.3d at 158 (emphasis added). "Because neither the Government nor *Giles* served the estate pursuant to Rule 4," the court treated the motion to substitute and the suggestion of death as "nullities" and concluded that the trial court "lacked personal jurisdiction over the estate." *Giles*, 698 F.3d at 159 (citing *Atkins v. City of Chicago*, 547 F.3d 869, 874 (7th Cir. 2008)). As such, the *Giles* court vacated the trial court's denial of *Giles*'s motion to substitute and remanded "for *Giles*

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 20

to have an opportunity to refile his motion to substitute and serve the estate." *Id.*

Here, the plaintiffs assert that Felice's widow, Rosemary Felice, should be substituted as Felice's successor in interest.

There is no indication in the record that the motion to substitute was served on Rosemary Felice. In fact, there is no indication in the record that the plaintiffs' motion was served on any potential personal representative or successor in interest to Felice. Though Attorney Meade was counsel for Felice before Felice's death, there is no indication on the record that Attorney Meade began to represent Felice's estate or successor in interest after Felice's death. As such, Attorney Meade's representation of Felice ended when Felice died. *See, e.g., Giles*, 698 F.3d at 158 (holding that the representation of the deceased defendant's attorney ended when the deceased defendant died.) Because the plaintiffs were required to, yet failed to serve Felice's successor in interest, the Court lacks personal jurisdiction over such successor. *See id.* at 158-159.

The premises considered, it is hereby

ORDERED that the motions to substitute are **DENIED**; and it is further

Walters v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-24

Kromenhoek v. Cowpet Bay West Condominium Association, et al.

Civil No. 2012-25

Order

Page 21

ORDERED that the plaintiffs shall, to the extent they wish to do so, have leave to file and serve motions to substitute until June 28, 2013, the failure of which may result in the dismissal of all claims asserted against Alfred Felice.

S\ _____
Curtis V. Gómez
Chief Judge